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CASE NO. 91-1326

**In The
Supreme Court of the United States
October Term, 1992**

**THE DISTRICT OF COLUMBIA
And
SHARON PRATT KELLY, MAYOR,**
Petitioners,
v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt all state laws which relate to a *covered* ERISA plan? In particular, if a workers' compensation law requires an employer to provide an *exempt* ERISA plan, but the law ties the *exempt* ERISA plan's benefit level to the benefit level of a *covered* ERISA plan, is the workers' compensation law preempted? Thus, did the Court of Appeals in the decision below correctly hold that while a workers' compensation law can generally require specified medical benefits for injured workers, where the specified medical benefits are triggered by and tied to the employers' health insurance benefits (health insurance being a *covered* ERISA plan), the law is preempted by ERISA?

Petitioners and Amici also raise for the first time in this appeal the argument that the workers' compensation law does not "relate to" a covered ERISA plan when it requires benefits which are tied to and thus equal to the covered ERISA plan. This argument raises the question whether this issue was waived because it was not raised below or in the petition for writ of certiorari, and indeed, the Petitioners below conceded that the District of Columbia workers' compensation law relates to a covered ERISA plan?

Moreover, even if the argument was not waived, the question then is whether precedents of this Court, as well as the plain meaning of the term "relates to," make clear that a law explicitly requiring benefits triggered by, and based on, a covered ERISA plan, relates to such a plan?

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that it is a non-profit corporation which pursues the interests of the business community in the greater Washington, D.C. area.

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THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

BRIEF OF RESPONDENT

The Respondent, The Greater Washington Board of Trade, by its counsel, respectfully submits this response brief in support of the decision below of the United States Court of Appeals For The District of Columbia Circuit.

STATEMENT OF THE CASE

The Respondent disagrees with Petitioners' statement of the case in several important aspects. The Petitioners attempt to avoid the ERISA statutory provisions and Petitioners confuse three ERISA terms of art: (1) an employee benefit plan, (2) a covered employee benefit plan and (3) an exempt

employee benefit plan. The Petitioners also miscite and omit several important aspects of the case.

The key ERISA provision in this case is section 514(a). 29 U.S.C. § 1144(a). In pertinent part, section 514(a) is as simple as it is clear. Any state law which "relates to" an employee benefit plan defined in section 4(a) [section 1003(a) in U.S.C., referred to as a *covered* ERISA plan], as opposed to those employee benefit plans defined in section 4(b) [section 1003(b) in U.S.C., referred to as an *exempt* plan], is preempted:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).

In section 514(b) of ERISA, certain state laws, *e.g.* insurance laws, were saved from this preemption provision, but of critical import, workers' compensation laws were not included in this saving clause:

Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A).

Totally separate from the preemption provision, in the beginning of the statute, in section 4, ERISA

sets forth those types of health and welfare plans which are covered by ERISA, and thus must comply with ERISA's substantive provisions: reporting and disclosure requirements (part 1), participation and vesting mandates (part 2), funding criteria (part 3) and fiduciary responsibility (part 4).¹ Section 4(a) sets forth a broad definition of *covered* health and welfare plans, 29 U.S.C. § 1003(a), and section 4(b) narrowly defines certain plans which are *exempt* from ERISA coverage and thus do not have to meet the ERISA reporting and fiduciary requirements, including plans maintained solely to comply with workers' compensation laws:

(b) The provisions of this subchapter shall not apply to any employee benefit plan if –

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

29 U.S.C. § 1003(b)(3) (emphasis added). Of critical import, this provision exempts only the listed *plans* from ERISA's reporting and fiduciary requirements; it does not protect *laws* in any manner, and certainly

¹ Part 1 is at 29 U.S.C. § 1021-1031; part 2 is at 29 U.S.C. § 1051-1061; part 3 is at 29 U.S.C. § 1081-1086; and part 4 is at 29 U.S.C. § 1101-1114 (these provisions will hereinafter be referred to as "the ERISA reporting and fiduciary requirements"). Section 514 is in part 5 which deals with enforcement and has no substantive requirements for plans.

does not exempt any *laws* from the section 514(a) preemption.²

This distinction between *covered* plans and *exempt* plans is needed, because ERISA in its definitional section, broadly defines the term "employee benefit plan." 29 U.S.C. § 1002(1). Virtually any benefit an employer provides its employees is an "employee benefit plan." Thus, the definition includes not only pensions and health insurance, but the definition is so broad it encompasses benefits provided to comply with workers' compensation laws, disability laws, and unemployment compensation laws. If the employer gives a benefit to its employees for virtually any reason, the system of benefits is an ERISA "employee benefit plan." The key question is whether the plan is a *covered* plan or an *exempt* plan.

This Court has adopted this terminology of exempt and covered plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.16 (1983) ("Of course, § 514(a) pre-empts state laws only insofar as they relate to *plans covered by ERISA*."); *Mackey v. Lanier Collection Agency Service, Inc.*, 486 U.S. 825, 829 (1988) (ERISA § 514(a) pre-empts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan *covered* by the statute."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (referring to "exempted plans"). Thus, the issue is not whether benefits are part of an

² In terms of ERISA's various reporting and fiduciary requirements, the distinction between *covered* and *exempt* plans is quite logical. The States already regulate reporting and fiduciary requirements for their workers' compensation plans. See legislative history discussed in part I, *infra*.

ERISA "employee benefit plan." The question is whether the ERISA benefit plan is an *exempt* ERISA plan or *covered* ERISA plan. Of critical import, ERISA preempts state laws which relate to *covered* plans, but ERISA does not preempt state laws which only relate to *exempt* plans. 29 U.S.C. § 1144(a).

Three misstatements in the Petitioners' Statement of the Case also need to be corrected. First, Petitioners state that "ERISA reserves to the state the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation and disability insurance laws, as well as legislation governing insurance, banking, security." Petitioners' Brief at 3. In point of fact, as noted above, ERISA only saves insurance laws, banking laws, and security laws. 29 U.S.C. § 1144(b). Workers' compensation laws (as well as unemployment compensation laws and disability laws) are *not* included in the ERISA saving clause. *Id.*³

³ Of course, as noted above, *plans* which are designed to comply with workers' compensation laws (as well as unemployment compensation laws and disability laws) are exempt from ERISA's reporting and fiduciary requirements, and thus are referred to as *exempt* plans. 29 U.S.C. § 1003(b)(3). This provision protects the *plan*, but not the *law*. See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (emphasis added) (citations omitted) ("They reason that 'if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage." *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws."* 29 U.S.C. § 1144(a). The only relevant state

(Continued on following page)

Second, the Petitioners' characterization of the Court of Appeals' discussion of the *Shaw* decision as containing an "express contradiction" (as to whether the law in *Shaw* related to a covered ERISA plan) is also inaccurate. Petitioners' Brief at 9. This Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) held that if a law relates to a *covered* plan, the law is preempted; if the law only relates to an *exempt* plan, the law is not preempted. This Court in *Shaw* had one of each type of law before it, thus one law was held preempted, and one was not. *Id.* at 97 and 106.

Similarly, contrary to the Petitioners' assertion, Petitioners' Brief at 10, the Court of Appeals in its decision below did identify the administrative burden the District of Columbia workers' compensation law will impose on the covered ERISA plan – the employee's health insurance:

While it is certainly true that the [*District of Columbia*] *Equity Amendment Act* does not require employers to alter ERISA-covered plans, it *explicitly ties the benefit levels of the workers' compensation plan to those of the ERISA-covered plan.* . . . The fact that the benefits to be provided to an employee receiving workers' compensation will be equivalent to the benefit levels provided while the employee is fully employed means that *every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect*

(Continued from previous page)

laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope.").

that such a change would have on its unique obligations to its District employees receiving workers' compensation. In light of the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether. This could have a substantial effect on the administration of an ERISA-covered plan.

Cert. Pet. App. at 17a-18a (footnote omitted) (emphasis added). The Court of Appeals also noted, moreover, that an administrative burden is not required for preemption to apply. Cert. Pet. App. at 18a.

Petitioners in their brief state that workers' compensation laws "typically" set their benefit levels based on fringe benefits workers receive, including health insurance. Petitioners' Brief at 2-3. In point of fact, only Connecticut and the District of Columbia have an "equivalent" benefit requirement for health insurance in their workers' compensation laws, and only six of the fifty states include health benefits in the workers' compensation average weekly wage (which is what the workers' compensation is based on). See AARP Brief at 6, citing 2A *Larson, Law of Workermen's Compensation* § 60.12 (1991 Cum. Suppl.).

Finally, Petitioners in their statement of the case fail to note that before the District Court and Court of Appeals, and in the Petition For Writ of Certiorari, the Petitioners conceded that the District of Columbia workers' compensation law "relates to" a covered ERISA plan. See part II, *infra*.

SUMMARY OF THE ARGUMENT

The District of Columbia workers' compensation law "relates to" a *covered* ERISA plan, because the new law ties its mandated workers' compensation plan benefits to the employer's health insurance plan benefit levels, and the health insurance plan is a covered ERISA plan. Section 514(a) of ERISA preempts all state laws which relate to a *covered* ERISA plan, as opposed to an *exempt* plan. Thus, by its plain terms, section 514(a) preempts the District of Columbia's workers' compensation law, to the extent it creates benefits triggered by, and based on, an employer's health insurance.

The Petitioners' and the Second Circuit *Donnelley* decision's reliance on this Court's ruling in *Shaw* is misplaced. The *Shaw* decision dealt with a state law which only related to an *exempt* ERISA plan. This Court in *Shaw* held such a law was not preempted because it only related to an exempt plan, *and* the exempt plan was not required to be part of the covered ERISA plan. In contrast, the District of Columbia law relates to a *covered* ERISA plan.

Nor does section 4(b) of ERISA somehow save the District's workers' compensation law from preemption. As this Court noted in *Alessi*, section 4(b) only saves exempt *plans* from ERISA's reporting and fiduciary requirements; section 4(b) does not save *laws*. This is clear from the wording of the statute, the legislative history, as well as the structure of the statute. ERISA has a preemption saving clause in section 514(b) which, for example, saves insurance laws from preemption. Conspicuous in its absence

from section 514(b) is any reference to workers' compensation laws.

In desperation, Petitioners and two Amici attempt to argue that the District's workers' compensation law does not relate to a covered ERISA plan, "merely" by triggering a right by, and basing the amount of the right on, the covered ERISA plan. The initial problem with this argument is that it was waived. The Petitioners not only failed to raise this issue below and in their petition for writ of certiorari, Petitioners actually conceded the reverse – agreeing that the workers' compensation law relates to a covered ERISA plan. Indeed, the second problem is that no Court, including the Second Circuit in *Donnelley*, and the District Court below, has ever held otherwise.

Moreover, this Court has previously "drawn the line" as to when a state law relates to a covered ERISA plan, and thus there is no need for further clarification. This Court has explicitly held that if a law creates rights or a cause of action based on a covered ERISA plan, then it relates to the plan. Conversely, general application statutes which encompass ERISA benefits in their remedy or application, but are not directed explicitly at a covered ERISA plan, are not preempted merely because they have a minor effect on the plan. What Petitioners and Amici want is not a clarification, but rather a rewrite of the statute.

The simple fact is that wherever the line is, the District's workers' compensation law is way over it. Any law which explicitly cites to a covered ERISA plan, which creates a right triggered by a covered

ERISA plan, and which bases the extent of the right on the benefit level of the covered ERISA plan, certainly under plain English "relates" to the covered ERISA plan. Simply put, there is not a need for clarifying where to "draw the line," and, moreover, the facts of this case do not raise the issue.

ARGUMENT

I. PETITIONERS INCORRECTLY ARGUE THAT ERISA HAS A TWO-STEP PREEMPTION TEST. THE "RELATES TO" TEST IS BY ITS TERMS AND BY THIS COURT'S PRECEDENTS SIMPLE AND CLEAR: ANY LAW WHICH RELATES TO A COVERED ERISA PLAN IS PREEMPTED. THE SHAW DECISION DOES NOT STATE OTHERWISE, AND SECTION 4(b) DOES NOT SAVE ANY LAWS. BY TYING THE WORKERS' COMPENSATION BENEFITS PLAN TO A COVERED ERISA PLAN (HEALTH INSURANCE), THE D.C. LAW IMPERMISSIBLY RELATES TO A COVERED ERISA PLAN AND IS PREEMPTED BY ERISA.

Petitioners' primary argument is that a state law, which requires an employer to establish an *exempt* employee benefit plan (workers' compensation benefits), is not preempted by ERISA, even if the *exempt* plan it requires relates to a *covered* employee benefit plan, provided the exempt plan is kept separate from the covered plan. Petitioners argument fails because there is absolutely nothing to support such an argument in the statute, and the argument is based on a totally inaccurate reading of this Court's

decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

It is often forgotten that the required starting point, and often the ending point, for applying a statute is the statutory language. Section 514(a) of ERISA is incredibly simple. If a state law relates to a *covered* ERISA plan, as opposed to an *exempt* ERISA plan, it is preempted; period, end of discussion! There is no saving clause in ERISA based on keeping the *exempt* plan and *covered* plan separate. Petitioners do not even attempt to explain what in the ERISA's statutory language suggests, let alone permits, the "separate even if it relates to" exception they advocate. While admittedly this argument was started by the Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), there is similarly nothing in the *Donnelley* decision which even tries to explain how section 514(a) requires, or even permits, the Petitioners' argued for two-step approach. Petitioners cannot properly ask this Court to create a two-step approach, when Congress in the statute wrote only a one step approach - "relates to."

Petitioners and the *Donnelley* Court cite, of course, to this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). With all due respect, they are turning the *Shaw* decision on its head. This Court in *Shaw* had before it, in pertinent part, a disability law which mandated a certain number of weeks of benefits. Under section 4(b) of ERISA, disability benefit plans are exempted from ERISA. Thus, the plan the law created was an exempt plan. Since the exempt plan's benefit levels were *not* tied to a covered ERISA plan, the disability law in *Shaw* did

not relate to a covered ERISA plan.⁴ Thus, the holding in *Shaw* was rather straightforward: the disability law was not preempted because it did not relate to a covered ERISA plan, but rather it only related to an exempt plan:

The Disability Benefits Law presents a different problem. Section 514(a) of ERISA pre-empts state laws that relate to benefit plans "described in section 4(a) and not exempt under section 4(b)." Consequently, while the Disability Benefits Law plainly is a state law relating to employee benefit plans, *it is not pre-empted if the plans to which it relates are exempt from ERISA under § 4(b).*

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 106 (1983) (emphasis added).

The *Shaw* decision, in order to assure that the disability law did not relate to a covered ERISA plan, went even one step further. This Court held that if the state law required that the exempt ERISA plan even be part of the covered ERISA plan, then that required combination of the plans alone would mean the law relates to the covered ERISA plan and is preempted. However, if the state law merely gave the employer the option (but not the requirement) to combine the two plans, this option was too tenuous

⁴ Petitioners argue that the disability law in *Shaw* related to a covered ERISA plan. This is not accurate. The disability law related to an employee benefit plan (providing disability benefits is an employee benefit plan), but the employee benefit plan was *NOT* a covered plan; it was an exempt plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 93, 106 (1983).

alone to trigger the "relates to" test. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983).

The Petitioners and the *Donnelley* Court have turned this *Shaw* safeguard on its head. *Shaw* held that if an exempt plan is even required to be combined with a covered plan, the law requiring the combination is preempted. The Petitioners then argue the reverse must be true – any law which requires a separate plan is not preempted no matter how much it "relates to" a covered ERISA plan. There is nothing in logic or the *Shaw* decision which would allow such an inverted result. Indeed, this Court in *Shaw* explicitly noted that the disability law in question could *not* even be enforced through regulation of a covered ERISA plan:

We further hold that the Disability Benefits Law is not pre-empted by ERISA, although New York *may not enforce its provisions through regulation of ERISA covered benefits plans.*

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 109 (1983) (emphasis added).

The Petitioners' and *Donnelley* Court's misreading of the *Shaw* decision was nicely explained by the Court of Appeals below:

The [District of Columbia] Equity Amendment Act relates, in fact, to two different plans: First, the Act "relates to" an ERISA-covered plan by requiring that the new benefits be "equivalent" to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who already provide benefits under a covered

plan. Second, by requiring new benefits to be provided to employees who have been injured on the job, the Act "relates to" a workers' compensation plan that is, by virtue of the exemption for such plans under section 4(b)(3), exempt from ERISA coverage. So, the Act relates both to an ERISA-covered plan and to a plan that is exempt from ERISA coverage.

The district court relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the argument that because the Act related to a plan that was exempt from ERISA coverage, it was saved from preemption.

* * *

But in our case, as we have already observed, the Equity Amendment Act relates to two plans – one that is ERISA-covered and one that is exempt from ERISA coverage. Had the Equity Amendment Act related only to the workers' compensation plan – had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation – it would clearly have survived preemption under the principles announced in Shaw.

The key issue in distinguishing Shaw from this case is that the Court in Shaw never found that New York Disability Benefits Law related to an ERISA-covered plan. The Court did find that the Disability Benefits Law plainly related to an "employee benefit plan," Shaw, 463 U.S. at 106, but a law is preempted under section 514(a) only if it

relates to an employee benefit plan that is not exempt. The plan to which New York Disability Benefits law related was exempt, so the law did not even qualify at the threshold for preemption.

Shaw would have governed this case had the Equity Amendment Act related only to the exempt plan; in that case, the Act would not have been preempted. *But Shaw does not tell us why an Act that relates to an ERISA-covered plan can avoid preemption simply because it also relates to a plan exempt from ERISA coverage.* Not only is there no authority in Shaw for this proposition, but it is entirely at odds with ERISA's statutory structure.

* * *

But the Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans.

Cert. Pet. App. 11a-15a (footnotes omitted)(emphasis added).

Petitioners also argue that since all workers' compensation laws relate to a *covered* ERISA plan, such laws must be permitted if the plan they require is separate from the *covered* ERISA plan. Petitioners' Brief at 16-17. Even if this were true, only Congress,

and not the Courts, can amend ERISA. Moreover, Petitioners' premise is simply not accurate. Not all workers' compensation laws relate to a *covered* ERISA plan. To the contrary, virtually all workers' compensation laws do not relate to a covered ERISA plan; rather, such a relationship only occurs in the rare circumstances, such as in the Connecticut and District of Columbia laws discussed herein, where the workers' compensation system ties its benefit levels to the employer's health insurance plan. If that tie is not attempted, there is no relation to a *covered* ERISA plan and hence there is no preemption. That is the whole point of the *Shaw* decision. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). Indeed, the *Shaw* decision's only limitation is that, to make sure there is no tie to a *covered* ERISA plan, the law cannot even require that the *exempt* ERISA plan be part of a *covered* ERISA plan.

The Petitioners have essentially abandoned their earlier argument that section 4(b) somehow saves an exempt ERISA plan from preemption even if the plan, and the state law creating it, relate to a covered ERISA plan. Indeed, this Court eliminated such an argument in *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981). This Court in *Alessi* had before it a New Jersey workers' compensation law which prohibited an ERISA pension plan from taking a credit (and thus reducing the pension) by the amount of any workers' compensation payments. This Court held that the workers' compensation law was preempted because it related to an ERISA plan which covered more than workers' compensation (*i.e.*, the pension plan). Of critical import, in *Alessi* this Court was faced with exactly the argument the District Court

herein accepted: if the workers' compensation *plan* is not covered by the ERISA pursuant to section 4(b), then "a fortiori" the *law* which requires the plan is automatically not preempted under section 514(a). This Court emphatically rejected this argument, noting that section 4(b) saves *plans*, not *laws*. As this Court noted, such an interpretation "wreaks havoc on ERISA's plain language":

Retirees in No. 79-1943, however, claim that the exception (for workers' compensation plans) should apply more generally to plans governed by state workers' compensation laws. *They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage."* Reply Brief for Appellants in No. 79-1943, p. 18. *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws."* 29 U.S.C. § 1144(a). *The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope. And the relevant exemption from ERISA's coverage for plans maintained solely for compliance with state workers' compensation laws has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining. As retirees do not, and cannot, claim that the plans involved here are free from ERISA's coverage, they cannot claim*

the exception to preemption restricted to laws governing such exempted plans.

Id. at 451 U.S. 523 n.20 (emphasis added).⁵

Respondent would also note that the ERISA legislative history, in the Conference Report, is clear that the section 4(b) exemption was designed to merely relieve exempt *plans*, including workers' compensation plans, from the ERISA "reporting and disclosure requirements" and "fiduciary duties" requirements, and thus does not save any *laws* from preemption:

Plans subject to the provisions and exemptions.

Under the conference substitute, the new *reporting and disclosure requirements* are to be administered by the Secretary of Labor and are to be applied to all pension and welfare plans established or maintained by an employer or employee organization engaged in, or affecting, interstate commerce. Governmental plans, certain church plans, *workmen's compensation* and unemployment compensation plans, plans maintained outside the United States for the

⁵ The District Court minimized this footnote in *Alessi*, arguing it was a side comment. The fact is, however, that this Court in its *Shaw* decision favorably cites to this same *Alessi* footnote. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107 (1983).

Indeed, the problem with the *Donnelley* analysis can be easily seen by applying it to the facts before this Court in *Alessi*. The Second Circuit decision would allow a state to avoid the mandate of *Alessi* by requiring employers to provide a workers' compensation benefit equal to the amount by which the pension plan is reduced due to the workers' compensation credit.

benefit of persons substantially all of whom are nonresident aliens, and so-called excess benefit plans, which provide benefits in addition to those for which deductions may be taken under the tax laws, are *exempted from the requirements*. The Secretary of Labor also is authorized to waive and modify certain of these requirements for employee benefit plans.

All plans of the types subject to the *reporting and disclosure provisions* are to be required to file an annual report with the Secretary of Labor regardless of the number of participants involved. However, simplified reports may be authorized for plans with fewer than 100 participants.

H.R. Rep. 93-1280, 93d Cong., 2d Sess. 255-56 (emphasis added).

The House report contained a similar discussion, under the heading "fiduciary responsibility and disclosure:"

TITLE I – FIDUCIARY RESPONSIBILITY AND DISCLOSURE

Section 101. Coverage

Title I would cover all private employee benefit plans under Commerce Clause jurisdiction except:

1. Plans of the Federal government;
2. *Plans required under workmen's compensation, unemployment compensation, and disability insurance laws;*

3. Plans established or maintained outside the United States for the benefit of non-United States citizens;
4. Unfunded deferred compensation schemes of top executives.

H.R. Rep. 93-533, 93d Cong., 1st Sess. 18 (emphasis added).

The Senate report also indicated the exemption was merely to relieve exempt plans from ERISA's disclosure and fiduciary requirements:

COVERAGE AND EXEMPTIONS

Section 104 – This section requires that, unless exempt, the provisions of the Act apply to any pension or profit-sharing-retirement plan established or maintained by an employer, a union, or both together in any industry or activity affecting interstate commerce. *The fiduciary and disclosure provisions of the Act apply to all employee benefit plans unless exempt.*

S. Rep. No. 93-127, 93d Cong., 1st Sess. 38 (emphasis added).

Section 609 – This section provides that this Act supersedes state laws covering the same matters. However, the Act does not exempt or relieve any person from complying with any state law regulating insurance, banking, and related matters, and *does not remove state jurisdiction over plans not subject to the Act. State courts are not prevented from asserting jurisdiction in compelling the accounting of a fiduciary or requiring clarification of the plan.* The Secretary or a plan participant may remove such a case from the

state to the federal court if it involves the applicability of the Act.

S. Rep. No. 93-127, 93d Cong. 1st Sess. 47-48 (emphasis added).

The legislative history is also clear that the section 4(b) exemptions are to be construed narrowly:

It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, *exemptions should be confined to their narrow purpose.*

S. Rep. 93-127, 93d Cong., 1st Sess. 18 (emphasis added).

The fact is that when Congress wanted to save state laws from preemption, it did so in section 514(b). 29 U.S.C. § 1144(b). When one recognizes this, it then becomes clear that section 4(b) is not a saving clause. If Congress wanted to save workers' compensation laws from preemption, it could have added them to the saved laws in section 514(b). While section 514(b) saves insurance laws from preemption, workers' compensation laws are *not* included in the section 514(b) saving clause. In this light, it is clear that section 4(b) is not a saving clause in terms of preemption, but rather section 4(b) merely exempts workers' compensation plans from the reporting and fiduciary requirements of ERISA.

Simply put, section 514(a), read literally, prohibits any state law from relating to a covered plan; whereas, section 4(b) relieves workers' compensation plans from the reporting and fiduciary requirements of ERISA. Thus, the District of Columbia mandated

workers' compensation *plan* is relieved from ERISA's reporting and fiduciary duty requirements. However, the *law* requiring the plan is preempted because it refers to and relies on a plan which is covered by ERISA (the employer's health insurance).

Respondent would note that it has an unexpectedly in its attempt to disclose the defects in the Petitioners' main argument. Amicus AFL-CIO, in a refreshing and much appreciated display of intellectual integrity, conceded that the *Donnelley* decision and Petitioners' primary argument are wrong:

The syntax of ERISA § 514(a), however, makes lucid that state laws are preempted insofar as the laws "relate to" ERISA employee benefit plans not exempt from ERISA coverage under § 4(b), whether or not the state law also relate to exempt plans.

Brief of Amicus AFL-CIO at 9-10.

Nothing in *Shaw*, then, insulates from ERISA's pre-emptive reach state laws that relate to both ERISA-covered employee benefit plans and benefit plans exempt from ERISA coverage under § 4(b).

Id. at 11.

The conforming language is structurally necessary because, as this Court opined in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), "ERISA's plan language . . . preempts not plans, but 'State laws.'" Section 4(b), on the other hand, exempts from ERISA coverage generally not state laws but certain plans. *Id.* Thus, § 4(a), which exempts § 4(b) plans from the affirmative coverage of ERISA's substantive provisions, will not, absent some explicit

statement in that regard, exempts laws relating to those plans from the ERISA preemption provisions.

Id. at 9 n.5.

The simple fact is that the Second Circuit *Donnelley* decision is devoid of any statutory authority and is based on a misreading of this Court's *Shaw* decision. In contrast, the Court of Appeals' decision below relies on the plain language of section 514(a) of ERISA, as well as ERISA's legislative history.

II. THE ARGUMENT OF PETITIONERS AND TWO AMICI - THAT A LAW WHICH TIES BENEFITS TO A COVERED ERISA PLAN DOES NOT RELATE TO THE COVERED ERISA PLAN - WAS NOT RAISED BELOW OR IN THE PETITION FOR WRIT OF CERTIORARI, AND INDEED THE REVERSE WAS CONCEDED BY PETITIONERS BELOW. HENCE THE ARGUMENT WAS WAIVED. MOREOVER, UNDER THIS COURT'S PRECEDENTS, AND THE PLAIN MEANING OF THE WORDS "RELATES TO," SUCH A LAW RELATES TO A COVERED ERISA PLAN. NO COURT HAS EVER HELD OTHERWISE, AND THIS COURT SHOULD DECLINE THE PETITIONERS' INVITATION TO REWRITE THE ERISA STATUTE. WHILE THERE IS A LINE DRAWN BELOW WHICH STATE LAWS DO NOT "RELATE TO" A COVERED ERISA PLAN, THIS COURT HAS ALREADY CLEARLY DRAWN THE LINE, AND THE FACTS OF THIS CASE DO NOT RAISE ANY ISSUE REQUIRING FURTHER CLARIFICATION.

The Petitioners and two Amici argue that the District of Columbia's workers' compensation law is

not related to a covered ERISA plan, despite the fact that the law triggers liability based on the existence of a covered ERISA plan and the law ties its mandated benefit levels to the terms of the covered ERISA plan. The first problem with the Petitioners' and Amici's "relates to" argument is that it was not only *not* raised as an issue before the District Court, Court of Appeals or in the Petition For Writ of Certiorari, the Petitioners actually conceded at each stage of the litigation exactly the opposite – that the District of Columbia's workers' compensation law relates to a covered ERISA plan. Thus, the argument was not only waived, it was conceded, and thus, it is too late for Petitioners to now raise the issue. Moreover, the argument is meritless because under the plain meaning of the term "relates to," as well as under this Court's precedents, the District's workers' compensation law, by triggering liability and measuring the created rights by the covered ERISA plan (health insurance), clearly relates to that plan.

The Petitioners, throughout this litigation, have not only failed to argue that the District of Columbia workers' compensation law does not relate to a covered ERISA plan, the District of Columbia at all stages of this litigation has explicitly *conceded* that the District's workers' compensation law relates to a covered ERISA plan. The District Court's decision below was based on the Respondent's motion for a preliminary injunction [the Respondent was the Plaintiff requesting a declaratory injunction] and the Petitioners' motion to dismiss. In its memorandum of points and authorities in support of its motion to dismiss, and in opposition to the motion for a preliminary injunction, the District of Columbia explicitly

conceded that its workers' compensation law "relates to" a covered ERISA plan:

Plaintiffs contend, and *defendants concede*, that section 2(c) [of the District of Columbia workers' compensation law] "relates to" a covered health plan because the benefits level dictated by section 2(c) are derived from a covered plan.

* * *

The instant *defendants likewise have no difficulty in conceding that section 2(c) "relates to" an ERISA covered plan*, just as the *Donnelley* Court found that the Connecticut statute related to an ERISA covered plan.

District of Columbia Memorandum of Points and Authorities dated March 26, 1991 at 3 and 8 (emphasis added).

Similarly, before the Court of Appeals, the District of Columbia conceded that its law relates to a covered ERISA plan:

Similarly, here, although the [District of Columbia] Equity Amendment Act "relates to" ERISA-covered benefit plans . . .

Ct. App. Brief of District of Columbia filed on September 6, 1991 at 19.

Likewise, in its Petition For Rehearing filed with the Court of Appeals, the Petitioners conceded the District of Columbia law "relates to" a covered ERISA plan: "Both the District's Equity Amendment Act and New York's Disability Benefits Law 'relate to' ERISA-covered plans." Ct. App. Pet. For Reh. filed

on December 16, 1991 at 2; see also at 5. (as noted above, Petitioners' statement that the New York law related to a *covered* ERISA plan is inaccurate).

Indeed, even in the District of Columbia's petition for a writ of certiorari to this Court, the District did not raise the issue of whether the District of Columbia workers' compensation law relates to a covered ERISA plan. Petition For Writ of Certiorari at i. To the contrary, the District stated (albeit incorrectly) that all workers' compensation laws relate to covered ERISA plan:

As a consequence, such state [workers' compensation] laws necessarily will "relate to" ERISA-covered employee welfare benefit plans.

Petition For Writ of Certiorari at 13.

This Court has repeatedly and recently held that it will not consider questions not raised before the courts below, and this Court will not consider issues not raised in the petition for writ of certiorari. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, No. 90-1029, ___ U.S. ___, 60 U.S.L.W. 4465 (1992); *Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711, 1716 n.4 (1991); *Air Courier Conference of America v. American Postal Workers Union*, ___ U.S. ___, 111 S.Ct. 913, 917 (1991). This Court in *Yee v. City of Escondido*, No. 90-1947, ___ U.S. ___, 60 U.S.L.W. 4301 (1992), recently addressed the waiver issue in a situation similar to the case herein. This Court noted that it normally will not address an issue not raised in the courts below, and will not address a question not raised in the petition for writ of certiorari, especially where no court has

ever addressed the issue and thus no conflict exists among the Circuits:

Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

Id. at U.S.L.W. 4305.

Rule 14.1(a) accordingly creates a heavy presumption against our consideration of petitioners' claim that the ordinance causes a regulatory taking. Petitioners have not overcome that presumption. While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question. The lower courts have not reached conflicting results, so far as we know, on whether similar mobile home rent control ordinances effect regulatory takings.

* * *

Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefits of developed arguments on both sides and lower court opinions squarely addressing the question. See *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552, n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion"). *In fact, were we to address the issue here, we would apparently be the first court in the nation to determine whether an ordinance like this one*

effects a regulatory taking. We will accordingly follow Rule 14.1(a), and consider only the question petitioners raised in seeking certiorari.

Id. at U.S.L.W. 4306 (emphasis added). For these same reasons, this Court should not consider Petitioners' "relates to" argument.

The second problem with the Petitioners' "relates to" argument is that no court has ever held, or even suggested, that the Connecticut and District of Columbia workers' compensation laws do not relate to a covered ERISA plan. To the contrary, the Second Circuit in *R.R. Donnelly & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), explicitly held that the workers' compensation law relates to a covered ERISA plan:

Applying these principles here, *we have little difficulty in concluding that section 31-284b "relate[s] to" employee benefit plans within the meaning of 29 U.S.C. § 1144(a) (1988).* Indeed, this conclusion is virtually compelled by our ruling in *Stone* regarding the predecessor provision, former section 31-51h. We said in *Stone*: We conclude . . . that section 31-51h of the General Statutes of Connecticut constitutes a forbidden state encroachment on a private employee benefit plan. Its only purpose is to add an additional statutory requirement – the cost of which is to be borne by the employer – to a private employee benefit plan. Thus, the state statute relates to an employee benefit plan as defined by ERISA and must be construed as preempted by 29 U.S.C. § 1144(A). 690 F.2d at 329.

Id. at 791-92 (emphasis added). Similarly, the District Court below found that the District of Columbia workers' compensation law relates to a covered ERISA plan. Cert. Pet. App. at 22a-23a, 25a.

Petitioners, and particularly Amicus AFL-CIO, recognize the lack of precedent supporting the "relates to" argument. Nevertheless, they argue that it is time to "draw a line" as to what is, and is not, related to a covered ERISA plan. The problem with this argument is that this Court has already addressed the issue in prior decisions, and the line has already been clearly drawn. Moreover, the law at issue in this case is patently not near the line, but rather, is without question way over the line, and thus the need to "clarify" the line is not presented by the facts of this case.

This Court, in its decisions, has clarified nicely the reach of the "relates to" test, leaving little doubt as to where the "relates to" line is drawn. First, as a way of introduction, this Court has held that the preemption test is "deliberatively expansive:"

"[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" . . . We have observed in the past that *the express pre-emption provisions of ERISA are deliberately expansive*, and designed to "establish pension plan regulation as exclusively a federal concern."

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) (citations omitted) (emphasis added).

Second, this Court has held that Congress meant what it said, and said what it meant, in using the term "relates to." Thus, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court essentially adopted the dictionary definition of "relate":⁶

A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.

Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983). This Court rejected a narrow definition of "relates to" which requires an effect on the core ERISA requirements:

Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

Id. at 98 (footnotes and citations omitted).

⁶ This Court in *Shaw* cited to Black's Law Dictionary's definition of relate:

See Black's Law Dictionary 1158 (5th ed. 1979) ('Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with').

Id. at 97 n.16.

Of critical import to the case herein, this Court, in *Mackey v. Lanier Collection Agency and Service*, 486 U.S. 825 (1988), held that when a statute is explicitly keyed to covered ERISA plans, by explicitly referring to such plans, then the law is automatically preempted. That the law may have no effect on the covered ERISA plan, or even a good effect, is irrelevant. "Singling out" a covered ERISA plan for special treatment automatically triggers the "relates to" test:

The Georgia statute at issue here expressly refers to – indeed, solely applies to – ERISA employee benefit plans. See n. 2, *supra*. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983) (emphasis added). On several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of § 514(a).

* * *

The possibility that § 18-4-22.1 was enacted by the Georgia Legislature to help effectuate ERISA's underlying purposes – the view of the Georgia Court of Appeals below, see 178 Ga.App., at 467, 343 S.E.2d, at 493 – is not enough to save the state law from pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."

* * *

Legislative "good intentions" do not save a state law within the broad pre-emptive scope of § 514(a).

* * *

The state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.

Id. at 829-830 (emphasis added).

[W]e also conclude that any state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. See Part II, *supra*. It is this "singling out" that pre-empts the Georgia antigarnishment exception.

Id. at 838 n.12.

To the extent there might have been any question left as to the reach of the preemption provision, this Court resolved any doubts in *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S.Ct. 478 (1990). In *Ingersoll*, this Court indicated that any reliance by a state law on a covered ERISA plan makes preemption mandatory. This Court in *Ingersoll* was faced with a state wrongful termination action which was based on an allegation the employee was terminated in order to avoid ERISA benefits. The cause of action did not directly affect any condition or provision of the ERISA plan. Indeed, the statute applied to all employee benefit plans, both covered ERISA plans and exempt ERISA plans. This Court nevertheless held that since the cause of action makes "reference to" and is "premised on" the ERISA plan, it was preempted. Simply put, because there would be no

cause of action without the covered ERISA plan, pre-emption is required:

In *Mackey* the statute's express reference to ERISA plans established that it was so designed; consequently, it was pre-empted. The facts here are slightly different but the principle is the same: *The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan.*

* * *

McClendon argues that the pension plan is irrelevant to the Texas cause of action because all that is at issue is the employer's improper motive to avoid its pension obligations. *The argument misses the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan.*

* * *

McClendon argues that § 514(c)(2)'s limiting language causes § 514(a) to pre-empt only those state laws that affect plan terms, conditions, or administration.

* * *

In *Mackey* the Court held that ERISA pre-empted a Georgia garnishment statute that *excluded* from garnishment ERISA plan benefits. *Mackey, supra*, 486 U.S., at 828, and n. 2, 829, 108 S.Ct., at 2184, and n. 2, 2185. *Such a law clearly did not regulate the terms or conditions of ERISA-covered plans,*

and yet we found pre-emption. Mackey demonstrates that § 514(a) cannot be read so restrictively.

Id. at 483-84 (emphasis added).

On the other side of the line, this Court has noted that for general application statutes, which do not explicitly refer to or cite to a covered ERISA plan, merely having an indirect and very minor affect on a covered ERISA plan, might be too "tenuous, remote or peripheral" to constitute a "relates to." *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 100 n.21 (1983). Thus, in *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1985), this Court held that general application garnishment laws, which make no reference to the covered ERISA plan and do not create a cause of action based on the covered ERISA plan, do not relate to the ERISA plan merely because there is a minor indirect effect.

Thus, the test is simple. If a state law explicitly creates a right or creates a cause of action based on a covered ERISA plan, it relates to the plan and is thus preempted. States cannot single out covered ERISA plans for special treatment, and thus all laws which explicitly refer to covered ERISA plans are preempted. Conversely, if the cause of action or right which the law creates is not explicitly triggered by the covered ERISA plan, but rather the law is a general application law, and the statute has no material effect on the plan, then a tenuous, remote or peripheral effect alone will not cause preemption.

To use two of the Amici's examples, a tort remedy and a wrongful discharge remedy will not relate to a covered ERISA plan merely because the remedy they

provide includes all compensatory damages, including those from a covered ERISA plan. Such laws are general application rights which do not specifically deal with or cite to a covered ERISA plan, and their effect on the plan is tenuous, remote or peripheral.⁷

⁷ AARP refers to six state laws which explicitly include health benefits in a workers' average weekly wage in order to calculate disability benefits. Explicitly including the cost of health insurance (which is a covered ERISA plan) in a workers' compensation average weekly wage is probably preempted because it singles out the covered ERISA plan for special treatment, and uses it to create a cause of action/right, i.e. workers' compensation benefits. While it does not have the continued administrative burden of the District's required "equivalent" plan, and instead is a one time cost calculation, the fact remains that the law singles out ERISA plans. If the average weekly wage, however, included all lost benefits and did not single out the covered ERISA plan benefits, then the preemption question would be tougher. Whether such an economic cost to the employer is merely "tenuous, remote and peripheral" would have to be examined. Workers' compensation is unlike a tort remedy, because for a tort remedy a third party, not the employer, pays the remedy. Similarly, it is arguably unlike a wrongful discharge remedy because it occurs much more frequently, with more certainty, and is a major business cost.

Amicus AARP argues that the state must be allowed a complete workers' compensation remedy. The fact is, however, most states disagree. Thus, forty-four of the fifty states do not include the cost of health benefits in the average weekly wage figure. Indeed, while AARP cites *Larson* as identifying the six states, *Larson* criticizes the six states which include fringe benefits in the average weekly wage. 2A *Larson, Law of Workmen's Compensation*, § 60.12(b) at 10-635. Similarly, this Court in 1983 held the federal Longshore and Harbor Workers' Compensation Act did not include health benefits in its average weekly wage, *Morrison-Knudsen Constr. Co. v. Director*, 461 U.S. 624 (1983), and Congress did not change this result when it substantially amended the Longshore Act in 1984. To the contrary, Congress amended section 2(13) of the Longshore Act, 33

(Continued on following page)

Indeed, the fact that the Petitioners and Amici use the hypotheticals of tort remedies, wrongful discharge, and workers' compensation average weekly wage brings up an important point. The issue of where to draw the line is simply not before this Court based on the facts of this case. With all due respect to the Petitioners and Amici, wherever the line is, the District of Columbia workers' compensation law is clearly way over it. It defies the English language to say that a law, which specifically cites to a covered ERISA plan, which creates a cause of action based on a covered ERISA plan, and indeed gauges that liability solely on the covered ERISA plan, does not relate to the covered ERISA plan.

The fact is, under the District's workers' compensation law, every time the employer creates or changes its covered ERISA plan, it will know that it is effectively creating an additional right and cost under the "equivalent" plan, as well as an added administrative burden, because what happens to the covered ERISA plan must happen to the required workers' compensation equivalent. The potential for

(Continued from previous page)

U.S.C. § 902(13), to make absolutely clear that the average weekly wage did not include fringe benefits. Pub. L. No. 98-426, 98th Cong., 2d Sess., 98 STAT. 1639 (1984). This Court has long recognized that workers' compensation is a compromise system which does not give a complete remedy, but rather is a trade-off. *Potomac Electric Power Co. v. Director*, 449 U.S. 268 (1980). Indeed, fundamental in Amici's attempt to rewrite the ERISA "relates to" language is the premise that workers' compensation is more important than ERISA, and thus must prevail in any conflict between the two. This assumption is incorrect. If Congress had wanted this result, it could have included workers' compensation in the section 514(b) exclusion of preemption, like it did for insurance. Congress did not do so.

abuse by the states would be tremendous. For example:

a. The workers' compensation law could require that its plan had to have the same administrator as the ERISA plan, and the administrator had to be bonded for all work he performed for all plans. Indeed, the workers' compensation law could also provide that the workers' compensation plan *and* any other plan administered by the same administrator had to be fully funded. Thus, through the workers' compensation law, a state could effectively require full funding for all ERISA plans.

b. The workers' compensation law could require that every time the covered ERISA plan decreased benefit levels, the workers' compensation plan would have to increase its benefit levels by a like amount. Thus, the covered ERISA plan would have a disincentive to lowering its benefit levels.

c. The workers' compensation law could provide that if the covered ERISA plan did not cover chiropractic care, then the workers' compensation plan would have to cover chiropractic care. The ERISA plan would be inhibited from excluding chiropractic care, and indeed, as a practical matter, could not do so.

d. The workers' compensation law could require that the "equivalent" benefit be insured. Thus, for self-insurers who voluntarily covered health benefits for injured workers, the law would be requiring them to insure benefits which previously were self-insured.

Indeed, if one looks at Petitioners' and Amici's briefs, it is clear that they are not really arguing that the workers' compensation law does not relate to a

covered ERISA plan based on the plain meaning of the term "relates to." Rather, the Petitioners and Amici AFL-CIO are really asking this Court to rewrite the ERISA statute. In place of "relates to," the Petitioners and Amici respectively request the following statutory language:

[A state law is preempted if] (1) it deals "with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like;" (2) it affects the content or administration of ERISA-covered employee benefit plans in a manner that offends the language or purposes of ERISA; or (3) it conflicts with other provisions of ERISA, such as its exclusive enforcement scheme.

Petitioners' Brief at 26 (footnote omitted).

[State laws are preempted if they] either are specifically designed to affect ERISA-covered employee benefit plans particularly or that, while not so designed, in fact have a substantial and unavoidable impact upon the operation of such plans.

Brief of AFL-CIO at 4.⁸

Whatever the merits of these proposals, they must be addressed to Congress, and not this Court. The fact is that Congress did not enact a "substantial affect on" or a "relates to core provision" standard for preemption. Indeed, this Court in *Shaw* and *Ingersoll* explicitly rejected such attempts to rewrite the

⁸ Amici AARP also discusses the interaction between different plans. AARP Brief at 13 and 13 n.13. However, section 514(a) preempts laws, not plans.

ERISA preemption test. There is no need to revisit the issue in this case.⁹

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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⁹ The American Optometric Association filed an amicus curiae brief dealing with the free choice of physician. That issue is not involved in this case. Oklahoma filed an amicus curiae brief dealing with ERISA plans being used as a substitute for workers' compensation insurance. Respondent does not believe this case will have any effect on that issue. In *Shaw*, this Court held that using an ERISA plan as a voluntary option does not by itself constitute a "relates to." Connecticut and Massachusetts in their amicus curiae brief merely repeat petitioners' arguments. For these reasons, Respondent does not address those briefs herein.